

No. 80888-1

MADSEN, J. (concurring)—Because the majority holds that RCW 7.70.150 violates the doctrine of separation of powers, reversal is appropriate in this case. Having already found the statute violates the Washington State Constitution, we need not look for additional reasons to reverse. Discussing whether the statute unduly burdens the right of access to courts is both unnecessary and problematic. Not only am I unconvinced that the statute violates the right of access to courts, but I am also concerned that including it as a factor for the present decision will result in an excessively broad interpretation of the right in the future.

I do not dispute that there is right of access to courts inherent in article I, section 10 of the Washington State Constitution. Nor do I dispute that it includes the right to discovery, or that extensive discovery might be required. *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780-82, 819 P.2d 370 (1991). However, the right to discovery is subject to limitation without violating the right of access to courts. Existing limitations on discovery include privilege, cost, and the condition that plaintiff meets pleading requirements before advancing to discovery. “[A]ccess must be exercised within the

broader framework of the law as expressed in statutes, cases, and court rules.” *Id.* at 782. The right to access is “necessarily accompanied by” rules of statute, court, or decisional law such as rules governing service of process or statutes of limitation. *Id.* Indeed, “recognition of a particular cause of action may depend upon judicial decisions.” *Id.*

To this end, we recognize that the discovery rules contemplate differing interests among the parties and resolve these conflicts by balancing the rights and interests of the parties. *Id.* at 783; *King v. Olympic Pipe Line Co.*, 104 Wn. App. 338, 362, 16 P.3d 45 (2000). Therefore, we must look beyond whether a statute potentially limits discovery before concluding it violates the right to access of courts. For example, the restriction on discovery should also be “unreasonable or arbitrary when balanced against the statute’s purpose and basis.” *Bailey v. Sanders*, 261 S.W.3d 153, 159 (Tex. App. 2008) (quoting *Yancy v. United Surgical Partners Int’l, Inc.*, 236 S.W.3d 778, 783 (Tex. 2007)).

Though imposing a stricter pleading requirement for malpractice or requiring supplemental materials at pleading is properly the purview of the judiciary, it is nonetheless acceptable where the plaintiff’s interests do not outweigh the legitimate interests behind the rule. The plaintiff would argue that because the trial court dismissed her claim, it denied her access to discovery and thus access to the courts. However, the plaintiff’s right to discovery is subject to limitations, such as those discussed above, and has not been unconstitutionally impaired in this instance.

The requirement that a certificate of merit accompany a pleading may impede a plaintiff’s ability to advance to discovery but is reasonable when balanced against the efficiency interests of the courts and the

interest of the legislature in creating affordable healthcare. The statute serves to decrease the number of malpractice claims by requiring a plaintiff to make a preliminary showing that a medical professional believes the petitioner's claim has merit. Whether the statute is necessary or wise, the legislature was attempting, through this requirement, to curb the cost of malpractice insurance by discouraging meritless claims. If a plaintiff fails to provide a certificate of merit and the claim is dismissed, the statute requires that the suit not be included when calculating insurance rates,¹ which would, in the legislature's view, decrease the overall cost of healthcare.

The plaintiff insists that the burden of obtaining a certification before discovery outweighs the legislative interests but ignores that her ability to provide a certification is not dependant on the discovery provided by the defendant. The certification requires only the knowledge available at the time and a reasonable probability that the act or omission fell below the reasonable standard of care. RCW 7.70.150(3). A practitioner examining the patient and record can make this determination. Considering the high probability that the plaintiff would have to seek further treatment, he or she should be able to obtain a preliminary certification from a medical practitioner.² The petitioner argues that this may not be possible without discovery but does not consider that patients

¹ "If a case is dismissed for failure to file a certificate of merit that complies with the requirements of this section, the filing of the claim against the health care provider shall not be used against the health care provider in professional liability insurance rate setting, personal credit history, or professional licensing and credentialing." RCW 7.70.150(5)(b).

² The plaintiff was able to obtain certificates of merit for claims against two other defendants, suggesting her failure to do so here was merely an oversight and that the requirement does not make advancing to discovery impossible.

have a right to their medical records and a right to share those records with other medical providers. RCW 70.02.030, .090.

Furthermore, we have found the right to access ““was never intended to guarantee the right to litigate entirely without expense to the litigants.”” *In re Marriage of King*, 162 Wn.2d 378, 391, 174 P.3d 659 (2007) (quoting *Doe v. State*, 216 Conn. 85, 98, 579 A.2d 37 (1990)). In this case, the plaintiff would be required to pay a reasonable fee for the reasonable time a health care provider spent in responding to discovery.³ Inevitable cost is strong evidence against the argument that the certification is a monetary barrier to discovery.

In addition, as the Illinois Supreme Court explained when faced with a similar argument based on access to the courts, requiring a litigant to obtain a pretrial certificate from a health care professional stating that the action is meritorious “is essentially no different from the parallel requirement generally applicable in malpractice cases that the plaintiff in such an action present expert testimony to demonstrate the applicable standard of care and its breach.” *DeLuna v. St. Elizabeth’s Hosp.*, 147 Ill. 2d 57, 73, 588 N.E.2d 1139, 167 Ill. Dec. 1009 (1992). In Washington, as well, a plaintiff will generally have to obtain expert testimony to establish the relevant standard of care and causation in a malpractice action against a health care provider. *Harris v. Robert C. Groth, M.D., Inc.*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983). No greater burden is placed on the plaintiff’s

³ CR 26(b)(5)(C) provides in part that a party seeking discovery must “pay the expert a reasonable fee for time spent in responding to discovery” unless manifest injustice would result.

access to courts by the certification requirement than is placed by the requirement that an expert establish these elements of a medical malpractice action.

Moreover, a finding that RCW 7.70.150 violates the right of access to the courts is inconsistent with the principles established in other cases. Plaintiffs challenge, for example, statutes of limitation on the basis that they deny access to the courts. However, there is a general reluctance to hold statutes of limitation unconstitutional in the face of a public interest of finality. The Delaware Supreme Court held, “the test for constitutionality of the statute was whether the time period before the bar became effective was so short as to amount to a denial of the right itself.” *Dunn v. St. Francis Hosp., Inc.*, 401 A.2d 77, 80 (Del. 1979); *see also Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St. 3d 54, 60, 514 N.E.2d 709 (1987) (holding a medical malpractice statute of repose requiring an action to be commenced four years after a negligent act violated the state constitution’s “open courts” provision when plaintiff was unable to discover existence of claim until three years after negligent act). In the instant case, we are not weighing a complete bar to plaintiff’s claim against the strong competing interests, so a conclusion that the statute denies access to court does not follow.

The problem with not ruling in accordance with the established principle is the almost certain increase in challenges to unfavorable changes in statutes and court rules. Notwithstanding a reversal or reconsideration, the legislature would be powerless to effect statutory change where the change would threaten plaintiffs’ right to relief, even where there are strong countervailing interests.

competing interests against the extent to which the statute burdens the plaintiff's right to access to the court when deciding whether the statute violates the right. In this case, the legislature's interest to curb malpractice insurance costs outweighs the moderate burden on the plaintiff.

In balancing the interests, the court should bear in mind the fact that just because a burden is imposed does not mean that the right to access is violated. The majority neglects this principle when it concludes that the certificate requirement "hinders" plaintiffs' right of access to the courts. Majority at 4. The majority goes on to say it "may not be possible" for a plaintiff to obtain such a certificate. *Id.* As explained throughout this opinion, a number of rules and requirements "hinder" a party's access, but whether there is an impediment, or burden, or hindrance is not dispositive of the question of access. Nor is speculation that the law will not work. This court has no ground to conclude that the law in fact will not be implementable as intended.

The majority's limited, speculative, and narrow assessment of the interests at stake is insufficient basis for the conclusion that RCW 7.70.150's certificate of merit requirement violates the right of access to the courts.

In addition to hobbling the legislature's ability to set standards for justice, the conclusion that this statute violates the right to access similarly encumbers the judiciary in its ability to establish court rules. Just as the legislature is bound by our state constitution, this court is also subject to its requirements. *Burns v. Alderson*, 51 Wn.2d 810, 812, 322 P.2d 359 (1958). The precedent the majority proposes would require us to find our own similar changes in court rules

violate the right of access to the courts doctrine. Following the majority's precedent, we would face countless challenges to these rules. To preserve our right to set court rules, the court should not hold that the statute violates the right of access to the courts.

AUTHOR:

Justice Barbara A. Madsen

WE CONCUR:

Justice James M. Johnson
